Regulation 4C was added. I conclude, therefore, that in their context the general words "any offence against these Regulations" must be so limited as to exclude offences punishable with penal servitude only.

For these reasons I have come to the conclusion that the Sessions Court has no jurisdiction to try offences under Regulation 4C(3) I have given very earnest consideration to this question and have set out my reasons at some length because as far as I can see my decision on the point is final. In my opinion the determination of this revision has involved a point which it would be desirable in the public interest to have determined by the Court of Appeal under section 34 of the Courts Ordinance, 1948. Unfortunately, however, that section makes no mention of revision, and I know of no means of bringing a decision of the High Court made on revision before the Court of Appeal. In view of the very wide powers of revision given to the High Court by the Courts Ordinance, 1948 it is a curious anomaly that decisions on appeal to the High Court can be referred to the Court of Appeal whilst decisions on revision are final. In my experience the questions which arise on revision are often points of very considerable importance which are not raised by way of appeal because the persons affected have been unrepresented. The inconveniences, not to say the dangers, of the present situation are, I think, obvious and it appears to me that an amendment of the law to remove this anomaly is highly desirable.

The result of my decision is that the purported convictions and sentences in this case must be set aside and the case remitted to the Sessions Court either for a fresh trial upon an offence within its jurisdiction or for preliminary enquiry to be held.

Convictions and sentences set aside.
Case remitted to Sessions Court.

EUSOF ALI & ANOR. v. NYONYA LEE GAIK HOOI.

[A. C. J. (Briggs, J.) March 24, 1952]

[Alor Star — Civil Appeal No. 29 of 1951]

Landlord and tenant — Assignment of monthly tenancy.

The question in this appeal was whether a parole monthly tenancy could be legally assigned. The learned President who tried the case held that it could not be legally assigned.

Held: the assignment in this case was valid to transfer the benefit of the monthly tenancy.

Cases referred to:—

(1) *Lee Thin Pung v. Lim Seang Kee & Anor.*, noted in (1949) M.L.J. 69.
(2) *Bradley v. Baylis, etc.* 8 Q.B.D. 195.
(3) *Ness v. Stephenson* 9 Q.B.D. 245.
(4) *Loke Yung Hong v. Shanghai Furniture Co. & Anor.* (1948) M.L.J. 136.
(5) *Elliott v. Johnson* (1866) L.R. 2 Q.B. 120.
(6) *Allcock v. Moorhouse* 9 Q.B.D. 366.
(7) *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.* (1902) 2 K.B. 660.
(8) *Liversidge v. Broadbent* (1859) 4 H. & N. 603.
(9) *Lampleigh v. Brathwait* 1 Sm. L.C. 10th ed. p. 136.
(10) *Arakans Smelting Co. v. Belden Co.* 127 U.S. 379, 387.
(11) *Humble v. Hunter* (1848) 12 Q.B. 310, at 317.

CIVIL APPEAL.

I. K. Meek for the appellants.
James Taylor for the respondent.

Cur. Adv. Vult.

Briggs, J. : — This appeal is from the decision of the learned President of the Sessions Court, Alor Star, on two consolidated suits, Nos. 69 and 132 of 1950. The respondent is the owner of a shop house, No. 27 Jalan Pekan Malayu, Alor Star, of which at all material times prior to 1943 one Gulam Ali was the tenant on a parole monthly tenancy at a rent of $75 per month. Whether by assignment or novation of contract, or without any change of the legal status of Gulam Ali, the premises were in 1944 in the *de facto* possession of one Kurban Hussein. He was in partnership with the first appellant, and his tenancy or other rights in the premises belonged beneficially to the partnership. The firm name was "H. Kurban Hussein", of which the initial "H" refers to the first appellant. The partnership was dissolved on 27th April, 1949, and the assets, including all Kurban Hussein's rights in respect of the premises, were taken over by the first appellant. I have no doubt that those rights were assigned in equity, if not in law, at that time, so far as was possible.

The respondent claimed at first to have had no notice of any of these changes when they took place. She pleaded that she had accepted Kurban Hussein as tenant, but only temporarily and on the express terms that he would within a short period hand back possession to Gulam Ali, who had gone to India, but was expected to return. How Gulam Ali could have

done this in the circumstances I do not understand. In any event the respondent's evidence did not support her pleadings. Kurban Hussein continued in occupation for several years and at some early stage the rent was increased to $80. I have no doubt that he became the tenant by assignment, or, if not by assignment, then by novation, and that he held the tenancy at all material times prior to the dissolution as trustee for the partnership.

On the dissolution of the partnership the first appellant considered himself the tenant : but I find no proof that the respondent ever did any act which would amount to an acceptance of him as tenant by novation. In August, 1950, the first appellant went to India, leaving his attorney the second appellant in *de facto* possession of the premises, but only as such attorney. Rent had been paid and receipts issued up to that time in the name of Kurban Hussein.

On 10th August, 1950, the respondent, in Civil Suit 69/50, sued the first appellant for possession of the premises and mesne profits on the basis that he was not a tenant, but a mere trespasser. On 22nd October, 1950, having failed to serve the first appellant, she sued the second appellant in similar form in Civil Suit 132/50. Later the first appellant was served and the suits were informally consolidated and heard together. It was part of the respondent's case in both suits that Kurban Hussein had been her tenant and that in July, 1950, she had sued him in ejectment, but had been unable to serve the proceedings.

The learned President held on these facts that both appellants were in possession, and that neither had any right to possession. He held that the tenancy was still vested in Kurban Hussein and that since the tenancy was a mere parole monthly tenancy it could not lawfully be assigned. He cited as authority for this *Lee Thin Pung v. Lim Seang Kee and Anor.*[1], which is noted, but not reported, at (1949) 15 M.L.J. 69. He added that, even if there had been a right to assign, "it was done verbally and without notice to the plaintiff." He made an order for possession against both defendants and ordered them to pay "rent" up to the date of delivery of possession and costs. If they were not tenants, they clearly could not be liable for rent as such, but I think this part of the order may fairly be read as giving mesne profits equated to the rent due by Kurban Hussein. The formal order has not been included in the record, an irregularity of which I have to complain far too frequently. The defendants appealed.

Mr. Taylor for the respondent first sought to show that the tenancy was still Gulam Ali's; but taking pleadings and evidence together I think that point is not open to him. The tenancy at one time certainly vested, even if on special terms, in Kurban Hussein, and it has not been shown how it could have revested in Gulam Ali. I start therefore from Kurban Hussein as tenant, and I think his was an ordinary monthly tenancy, not a tenancy at will or at sufference. Could this parole monthly tenancy be lawfully assigned by him to the first appellant?

I find this question much more difficult than it appears at first sight. Every tenancy may be considered from two aspects, which I may call the proprietory and the contractual. In Kedah a person "in possession of land under an unregistered lease or agreement" (which may be written or parole) "for letting for a period not exceeding one year" has a "title". Land Enactment section 43 (5). The nature of the title is not specified, but the word cannot possibly connote a merely contractual interest. *Prima facie* a proprietory interest, however small in extent, should, one would think, be assignable. The English common law restrictions on assignment have not been accepted in the States, as being in derogation of equitable rights and unsuitable to the circumstances of the country. This is consonant with the refusal to require any special form for a valid assignment. From the contractual aspect, in the States assignment of the benefit of contracts have always been recognised. Where, as in a normal tenancy, the obligation of the tenant is in effect confined to paying his rent, the landlord must now, under section 41 of the Contract (Malay States) Ordinance, 1950, accept that rent from a person other than the original tenant. If, however, the relation is, or resembles, one of landlord and lodger, the position is different. There is normally then an element of mutuality of duties and services, which will probably require that the contract be performed by the original tenant, and which renders assignment impracticable. Mrs. Smith may be willing to share her kitchen with Mrs. Jones, but is entitled to refuse to share it with Mrs. Brown. See *Bradley v. Baylis, etc.*[2] and *Ness v. Stephenson*[3], I think the law in Kedah was the same before the Contract Ordinance came into force.

In *Lee Thin Pung v. Lim Seang Kee & Anor.*[1] it is apparent from the original record that the assignor had been, if not in law a lodger, at least in a position closely akin to that. There were provisions in the contract that "not more than 3 or 4 persons" were to occupy the premises, and that "mutual arrangements" were to be made "about the doors and the use of the doors and the use of the kitchen." The premises sublet were the front part of the ground-floor of a shop house. The sub-lessor occupied the remainder of the building, and the provision about the front door

indicates that this would not be a case of passages or entrance hall in common use, but of regular traffic through the premises sublet, which appears to preclude exclusive possession in the sub-tenant. This would, I think, be quite enough to prevent assignment. Bostock Hill, J., while inclining to that view, did not decide the case expressly on that ground, but relied on the judgments of the Court of Appeal in *Loke Yung Hong v. Shanghai Furniture Co. and Anor.*[4], which he treated as direct authority that a parole monthly tenancy is in no case assignable. If it is authority for that proposition, the question is of course concluded; but I do not think it goes by any means so far.

The facts were that the premises, which were in Selangor, were held on monthly tenancy and were assigned in breach of an express condition prohibiting assignment. Spenser Wilkinson, J., at first instance never doubted that, apart from any restriction, such an assignment could be made, though owing to the express restriction it might be voidable or give rise to damages. In the Court of Appeal, Pretheroe, Ag. C.J., gave judgment on the footing that, although this assignment was a breach of condition, assignments generally in cases of monthly tenancies would be lawful; and he also expressed general agreement with the judgment of Evans, J., to be mentioned shortly. Murray-Aynsley, C.J., Singapore, in a dissenting judgment said :—

"I take it to be indisputable that tenants other than tenants at will and tenants on sufferance can assign their interests, unless restrained by the terms of the agreement from which such interest is derived."

and held the assignment to be valid. Evans, J., expressed grave doubts whether the benefit of a parole tenancy is assignable at all and based them on passages from the judgments of Mellor, J., and Lush, J., in *Elliott v. Johnson*[5]. But the decision of those learned Judges was, as I understand it, directed to the point that, whatever the effect of the assignment in question, it could not pass to the assignee the right to enforce directly against the landlord collateral stipulations, which the plaintiff there sought to do. Mellor, J., stressed that, so far as the mutual rights and obligations were to be considered as matters of contract, as the collateral stipulations must be, they could be regarded, since at common law no chose in action was assignable. The date 1866 is to be noted here. Certainly the decision in *Elliott v. Johnson*[5] has not been understood in England in the sense in which Evans, J., was inclined to take it. *Allcock v. Moorhouse*[6], is sufficient authority that in England a parole tenancy from year to year *is* assignable, at least so as to transfer the rights, even if not to extinguish the obligations, of the assignor. The proposition is stated in *Hill & Redman*, 6th edition, 22, as one free from doubt, and *Elliott v. Johnson*[5] is quoted, not as opposed to, but as supporting it. *Allcock v. Moorhouse*[6] is particularly helpful as regards the different rights and obligations arising from the contractual and the proprietory aspects of the tenancy. In the Malay States the situation is, I think, best to be understood from a passage, part of which Evans, J., quotes, from the judgment of Collins M.R. in *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.*[7]. I set out the whole :—

"It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor: See **Liversidge v. Broadbent**[8], and cases collected in the notes to **Lampleigh v. Brathwait**[9]. On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. Whether the right so created involves privity between the debtor and the assignee is, I think, doubtful; and the rule of the common law that the action must be brought in the name of the assignor shows that it did not regard such a transaction as equivalent to a novatio. The right seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and I think the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract — that is, the benefit of all that remains to be done under it — has been assigned; and it is in this sense only, as it seems to me, that contracts can be said in strictness to be assignable. There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all **in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person.** "You have a right", says Lord Denman, C.J., in a passage cited by Gray, J. in delivering the judgment of the Supreme Court of the United States in the case of **Arkansas Smelting Co. v. Belden Co.**[10], "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract": **Humble v. Hunter**[11]. To suits on these contracts, therefore, the orginal contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden

of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for — namely, work to be executed by the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent."

The words which I have underlined occur immediately after the end of the passage quoted by Evans, J.

I understand the whole passage to show that rights analogous to a lodger's may not be assignable at all; but I see nothing in it to suggest that the benefit of a normal contract of tenancy may not be assigned by the tenant. True, the original tenant will remain liable for unpaid rent after the assignment, if the assignee does not pay; but that is immaterial here. It may also be that in an action by the assignee the Court might require the assignor to be joined; but that does not arise here. Evans, J. points out that the practical importance of the question whether a parole monthly tenancy can be assigned arises from the Rent Restriction legislation. Were it not for that, a month's notice, and not legal proceedings, would be the landlord's normal reaction if he disliked the assignee. In present circumstances, under the Control of Rent Ordinance, 1948, the landlord can avoid any risk of rights arising in an assignee by merely converting the contractual tenant into a statutory tenant, who clearly cannot assign. If the landlord does not do this, it is true that his statutory obligation to permit continued occupation might ultimately be enlarged if assignment (e.g. by a contractual tenant likely to die soon) is permitted. In any case, he can prevent assignment by express condition. However that may be, I do not think that Evans, J., finally based his judgment on the general proposition that no assignment of a parole monthly tenancy could ever be made. On the principal issue he said (at page 142) :—

"The wording on the receipt is clearly a term imposed by the landlord, and I think that the evidence and findings show that the parties themselves understood the tenancy to be subject to a condition that it continued only while direct from the landlord, and that consequently an assignment would determine it."

Later he said :—

"On these findings the appellant is entitled to the relief claimed. He is not debarred by section 7 of the Rent and Charged Land (Restriction) Enactment, for the first respondent is, by virtue of his assignment, no longer the appellant's tenant or entitled to possession. The assignment divests him of his interest but is voidable at the appellant's option, or is void unless the appellant waives the effect of the condition and this is not the case here. The second respondents are trespassers."

This is very different from saying that there was no assignment because such an assignment would, apart from any express restriction, be a nullity.

There remains the question whether a tenancy from month to month is to be treated as inferior to a tenancy from year to year. I cannot see why it should. If a continuing right to occupy exists, it does not appear to me to matter in principle whether it continues for ten days or ten years. During that period it is equally a proprietory or quasi-proprietory right. A difference in principle arises when the tenancy is only at will, for there the continuing right to occupy does not exist, or at best is illusory because immediately extinguishable. Therefore assignment is not permitted.

I think that all the learned Judges in *Loke Yung Hong's case*[4] were prepared to assume that an assignment would or might have been valid, apart from the restriction, at least for some purposes. I conclude that Bostock Hill, J., may not have been bound by their decision, though he considered himself to be so bound. I am not myself prepared to treat the decision in *Loke Yung Hong's case*[4] as binding me in this case to hold the assignment invalid, and, in a case concerning premises in Kedah, I am not prepared to follow the decision in *Lee Thin Pung v. Lim Seang Kee & Anor.*[1] I hold that the assignment was valid to transfer the benefit of the monthly tenancy, with or without the benefit of protection under the Control of Rent Ordinance, 1948. I need say nothing on the point, except that it does not arise here, since the contractual tenancy has never been determined. The semi-contractual nature of the parole monthly tenancy does not appear to me to affect the situation at all, so far as the right to occupy is concerned, and that is the only matter with which I have now to deal. The respondent had notice of the first appellant's rights before she filed her suit.

I hold that there was no right in the respondent to determine the tenancy for non-payment of rent. The rent was repeatedly tendered and the only reason why it remains unpaid is that the respondent refused to take it. This cannot create arrears on which action may be taken.

The suit against the first defendant should have been dismissed with costs, and the suit against the second defendant must similarly fail. He was a mere agent relying on the first defendant's valid right to possession, not on any possession of his own. The appeal is allowed with costs here and below and the order of the Court below is set aside.

I must mention an affidavit filed by the respondent after the hearing. It alleges *inter alia* that the witness

who gave evidence as Kurban Hussein was in fact not Kurban Hussein, but an unknown impostor. In the view I take of the case this could not, even if true, be material. Nor are the other allegations in the affidavit material to affect my decision.

Appeal allowed.

AYYAR v. PARAMESWARA IYER.

[O. C. J. (Wilson, J.) March 14, 1953]

[K.L. — Selangor Civil Suit No. 131 of 1952]

Landlord and tenant — Parole monthly tenancy — Assignment.

Ayyamani was the monthly tenant of Iyer. There was no condition against assignment without consent. Ayyamani assigned the tenancy to Sethuraman Chettiar who in turn by agreement sold and transferred the business at the premises to the defendant. The agreement did not specifically assign the tenancy of the premises to the defendant but it provided that as from the date of the agreement the defendant should pay the rent of the premises. The defendant went into possession of the premises and the plaintiff, as administrator of the estate of Iyer, claimed possession on the grounds that the defendant was a trespasser.

Held: the assignment to Sethuraman Chettiar was valid and he was entitled to remain as a monthly tenant until his tenancy was determined; (2) Sethuraman Chettiar had the right to assign his monthly tenancy without anyone's consent; (3) the plaintiff had failed to establish that the defendant was a trespasser.

Case referred to :—

(1) *Eusof Ali & Anor. v. Nyonya Lee Gaik Hooi* Alor Star Civil Appeal No. 29 of 1951 now reported *ante* p. 98.

CIVIL SUIT.

B. J. P. Joaquim (*K. L. Devaser* with him) for the plaintiff.

A. J. Bostock Hill (*M. N. Cumarasami* with him) for the defendant.

Cur. Adv. Vult.

Wilson, J. : — The plaintiff, as administrator of the Estate of L. R. V. Iyer, claims from the defendant possession of premises known as No. 65, Ampang Street, Kuala Lumpur, on the grounds that the defendant was a trespasser. One Ayyamani previously was the monthly tenant of L. R. V. Iyer of the premises in question. L. R. V. Iyer died on the 1st February, 1950. Subsequently, on the 15th day of May, 1950, Ayyamani, by a document, purported to assign the tenancy of the premises to one R. M. Sethuraman Chettiar. For a certain period Meenambal Ammal, one of the widows of the deceased, received from Sethuraman Chettiar the rent of the premises, but later returned some of the rent received, and possibly all of the rent she had received, and refused to recognise Sethuraman Chettiar as the tenant, but it has not been proved that she returned all the rent she had received. There is evidence that previously Meenambal Ammal, at a meeting with two friends of Sethuraman Chettiar in India, agreed to accept and recognise Sethuraman Chettiar as the tenant of the premises. I would record that I think this is probably true, but having regard to the conclusions to which I have come in respect of the legal position, I do not think that this is material.

By an agreement made on the 6th June, 1951, Sethuraman Chettiar agreed to sell and transfer the business carried on at 65, Ampang Street to the defendant. That agreement does not specifically assign the tenancy of the premises to the defendant but it does provide that as from the date of the agreement the defendant should pay the rent of the said premises. Pursuant to the agreement, the defendant went into possession of the premises and is in occupation of them.

In Civil Appeal No. 29 of 1951[1], in the High Court at Alor Star, Briggs, J., had to consider whether a parole monthly tenancy could be lawfully assigned. Having discussed various authorities he stated :—

"There remains the question whether a tenancy from month to month is to be treated as inferior to a tenancy from year to year. I cannot see why it should. If a continuing right to occupy exists, it does not appear to me to matter in principle whether it continues for ten days or ten years."

Then later he said :—

"I hold that the assignment was valid to transfer the benefit of the monthly tenancy."

I agree with Briggs, J., and propose to follow the decision quoted. There is no suggestion that Ayyamani was in any way prohibited from assigning his monthly tenancy without consent. The monthly tenancy was a continuing tenancy unless and until determined. I do not agree with Mr. Joaquim that the assignment of a monthly tenancy is an unequivocal act of abandonment of the tenancy and, indeed, he has not cited any authority for this proposition.

I find the assignment to Sethuraman Chettiar is valid without the consent of the deceased's widow or administrator and that Sethuraman Chettiar was entitled to remain as a monthly tenant until his tenancy was determined. Sethuraman Chettiar also, in my opinion, had the right to assign his monthly tenancy without anyone's consent. It is arguable that he did not assign the tenancy of the premises by the agreement of the 6th June, 1951, but I do not think it is